DOCUMENT RESUME

ED 067 772 EA 004 627

AUTHOR Evers, Irving C.
TITLE A Talk on Sex Discrimination.
PUB DATE 19 Oct 72
NOTE 18p.; Speech given before New Jersey School Boards Association School Law Forum in Conjunction with New Jersey Association of School Attorneys and NOLPE (Atlantic City, New Jersey, October 19, 1972)

EDRS PRICE MF-$0.65 HC-$3.29
DESCRIPTORS *Civil Rights; *Court Cases; Employees; Equal Protection; Federal Laws; *Leave of Absence; Pregnancy; *Sex Discrimination; Speeches; *Teachers
IDENTIFIERS *Pregnant Employees

ABSTRACT

The topic of this speech covers the 1972 amendments to Title VII of the Civil Rights Act of 1964 and the subsequent court cases dealing with sex discrimination. The cases discussed cover maternity leaves for tenured as well as untenured teachers and other public employees. The issues basic to these cases involve mandatory maternity leaves at various months of pregnancy, maternity leaves for fixed terms, and employment termination for pregnancy. The decisions held in the case briefs presented appear to indicate that courts often strike down forced maternity leaves on equal protection grounds. (JF)

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A TALK

ON

SEX DISCRIMINATION

by

IRVING C. EVERS, ESQ.

Prepared for delivery at

SCHOOL LAW FORUM
NEW JERSEY SCHOOL BOARDS ASSOCIATION

Conducted in conjunction with

THE NEW JERSEY ASSOCIATION OF SCHOOL ATTORNEYS

and

NOLPE

held in

Atlantic City, New Jersey
October 19, 1972

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There have been a series of cases dealing with the subject of sex discrimination which require careful consideration. Strangely enough, none of the cases I have seen are any earlier than May of 1971. Dates are extremely important because of Title VII of the Civil Rights Act of 1964[1] as amended on March 24, 1972 by the Equal Employment Opportunity Act of 1972[2].

The term "person" as that term now appears in the law[3] includes governments, governmental agencies and political subdivisions. Previously, they were not covered by the law.

The term "employer" does not include the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia[4].

The language dealing with Exemptions now reads as follows:

> "This title shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."[5]

The Conference Report on the Amendment to the Civil Rights Act of 1964 stated that:

> "This section is amended to eliminate the exemption for employees of educational institutions. Under the provisions of this section. all private and public educational institutions would be covered under the provisions of Title VII.

> The special provisions relating to religious educational institutions in Section 703(e) (2) is not disturbed. - Section-by-Section Analysis, Cong. Rec. (H 1862), March 8, 1972."

The House Committee Report has the following interesting language:

> "There is nothing in the legislative background of Title VII, nor does any national policy suggest itself to support the exemption of educational institution employees - primarily teachers - from Title VII coverage. Discrimination against minorities and women in the field of education is as pervasive as discrimination in any other area of employment. - House Committee Report No. 92-238, June 2, 1971."

Section 703(a) of the Civil Rights Act of 1964 as amended, prohibits discrimination because of an individual's race, color, religion, sex, or national origin.

N.J.S.A. 18A:6-6 provides as follows:

> "No discrimination based on sex shall be made in the formulation of the scale of wages, compensation, appointment, assignment, promotion, transfer, resignation, dismissal, or other matter pertaining to the employment of teachers in any school, state college, college, university, or other educational institution, in this state, supported in whole or in part by public funds unless it is open to members of one sex only, in which case teachers of that sex may be employed exclusively."

See also N.J.S.A. 18A:28-10 and 18A:29-2. N.J.S.A. 10:5-12(a) also prohibits discrimination because of sex.

With those preliminary observations, let us now direct direct our attention to the cases that have come down dealing with the subject of sex discrimination prior to and since the 1972 amendments to Title VII of the Civil Rights Act of 1964.

One of the earliest cases to uphold a regulation requiring a pregnant teacher to take a maternity leave at a fixed number of months prior to an expected delivery date was La Fleur v Cleveland Board of Education, decided by the United States District Court for the Northern District of Ohio Eastern Division on May 12, 1971.[6] That case goes into a detailed discussion as to the reasons why the regulation was held to be valid, but it was reversed by the U. S. Circuit Court of Appeals, Sixth Circuit on July 27,1972[7].

In its reversal of the lower court, the Circuit Court of Appeals noted that since the decision of the lower Court the Schattman case, which will be commented upon hereafter, had come down; and Congress had amended Title VII of the Equal Employment Opportunity Act to make it applicable to public schools.

The Court held that the rule in question was inherently based upon a classification by sex and was, therefore, arbitrary and unreasonable in its overbreadth. There was a dissenting opinion in this case. In Cohen v Chesterfield County School Board,[8] decided by the United States District Court for the Eastern District of Virginia on May 17, 1971, aff'd by the Fourth Circuit Court of Appeals on September 14, 1972, it was contended that a regulation of the Chesterfield County School Board which required pregnant school teachers to take a leave of absence at the end of the fifth month of pregnancy violated the constitutional rights of the plaintiff in that it discriminated against her as a woman, thereby violating the equal protection clause of the Fourteenth Amendment.

Said the Court:

> "The unrefuted medical evidence is that there is no medical reason for the Board's regulation. As a matter of fact, pregnant women are more likely to be incapacitated in the early stages of pregnancy than the last four months. Further, there is no psychological reason for a pregnant teacher to be forced to take a mandatory leave of absence. In short, since no two pregnancies are alike, decisions of when a pregnant teacher should discontinue working are matters best left up to the woman and her doctor."

In conclusion the Court held that:

> "The maternity policy of the School Board denies pregnant women such as Mrs. Cohen equal protection of the laws because it treats pregnancy differently than other medical disabilities. Because pregnancy, though unique to women, is like other medical conditions, the failure to treat it as such amounts to discrimination which is without rational basis, and therefore is violative of the equal protection clause of the Fourteenth Amendment."

In Jinks v Mays[9], the United States District Court for the Northern District of Georgia, on September 23, 1971, affirmed in part by the U.S. Circuit Court of Appeals, Fifth Circuit on July 31, 1972, had occasion to consider a complaint attacking the policy of the Atlanta Board of Education which granted maternity leave to tenured teachers but denied it to untenured teachers. It was alleged that the policy was arbitrary and violated the Equal Protection Clause of the Fourteenth Amendment.

The Court upheld the argument saying:

> "The Court finds that the policy denying maternity leave to untenured teachers is arbitrary. It has no rational basis and bears no relevance

to the purpose of the Teacher Tenure Act or to the purpose of the administrative scheme of the Board of Education. Just as defendants grant study leave, bereavement leave, personal illness leave, emergency leave, and military service leave to both tenured and untenured teachers, so, too, must they grant maternity leave to both tenured and untenured teachers."

****

"For the foregoing reasons the court declares that defendants' arbitrary policy denying maternity leave to untenured teachers violates the Equal Protection Clause of the Fourteenth Amendment and is null and void. The court Orders that defendants be and they are hereby permanently enjoined from refusing to grant maternity leave to plaintiff and the class she represents. The court further Orders that defendants are enjoined from refusing to re-employ plaintiff Jinks as a teacher should she choose to resume teaching, on condition that there is at such time a vacancy within the school system. Plaintiff's prayer for back pay is Denied."

On September 28, 1971, in the case of Awadallah v New Milford Board of Education[10] a Consent Order was entered on a complaint filed with the New Jersey Division of Civil Rights providing that the respondents shall not discriminate against any person in violation of the Law Against Discrimination, that the respondents shall not maintain or enforce any policy or practice for the removal of any tenured or non-tenured teacher from her teaching duties that is based solely on the fact of pregnancy or a specific number of months of pregnancy.

The Order further provided that all tenured or non-tenured pregnant teachers may apply to the Board for a leave of absence without pay and shall be granted that leave at any time before the

expected birth and continuing to a specific date after birth. The date of return shall be further extended for an additional reasonable period of time at the teacher's request for reasons associated with the pregnancy or birth or for other proper cause. However, the Board of Education need not extend the leave of absence of a non-tenured teacher beyond the end of the contract school year in which that leave is obtained.

In Nancy S. Miller and James H. Blair, Director, Division on Civil Rights v Pequannock Township Board of Education et al[11], the Director of the Division of Civil Rights entered an Order declaring a policy of the Pequannock Township Board of Education requiring all teachers, tenured and non-tenured, to cease working at a specific month in their pregancy to be in violation of N.J.S.A. 10:5-12(a) as amended by P.L. 1970 Ch. 80. He Ordered the Board to grant to pregnant teachers a leave to be effective at a date requested by such teachers and to permit such teachers to return at the times designated by them. He further Ordered the Board to extend such leaves when requested or to reduce them. The Order further provides that if a tenured teacher wishes to extend her leave beyond the year in which it commences she shall be permitted to do so. In connection with tenured teachers the Order provides that if such a teacher wishes to extend such a leave to return at the beginning of any of the three school years following the school year in which her leave commences, the Board shall permit her to do so.

That Order is now on appeal.

In the matter of appeal of Anne Blumberg[12] an attack was lodged before the Commissioner of Education of the State of New York against a policy which provided that maternity leaves would be granted for no less than one year, no more than two years and in general will be terminated at the beginning of a term (first or second semester) at the discretion of the superintendent.

Said the Commissioner:

> "Boards of education admittedly have a primary obligation to provide uninterrupted instruction for their students. If this fundamental duty can be reconciled with the desire of an individual teacher to return to the classroom following the birth of her child, boards of education should make every effort to achieve this accommodation, rather than relying upon the rigid application of a local regulation, which, as has been indicated may lead to inequitable results.
>
> It should be evident that these remarks are not offered as a condemnation of any policy or regulation involving maternity leaves but rather as a suggestion that such policies and regulations should be administered with reasonable flexibility. When a board of education is aware of a teacher's wish to return to teaching at the beginning of a new term or school year, it might reasonably require her to submit a statement from her physician attesting to her physical ability to resume her duties. This information could be obtained well in advance of the teacher's anticipated return to school in order to allow the board ample opportunity to obtain a replacement should the teacher's physician indicate the inadvisability of his patient's return to the classroom at that time. Such a procedure could effectively reconcile the interests and desires of the teacher with the responsibilities of the board of education to provide uninterrupted instruction for its students.
>
> Upon consideration of the record before me in this case, I find that while respondent's maternity leave policy, as incorporated in the collec-

> tively negotiated agreement with its teachers, appears to be unduly rigid, there has been no abrogation of any constitutionally protected right of petitioner, and that there is no basis upon which I may properly set aside the maternity leave provision of the agreement."

In Guelich v Mounds View Independent Public School District No. 621[13] decided on November 24, 1971, the United States District Court, District of Minnesota, Third Division, ruled that a federal trial court had jurisdiction to entertain an action by a public school employee seeking a declaration that an administrative policy of the school relative to compulsory maternity leave was a denial of equal protection and requesting damages and injunctive relief.

In Cerra v East Stroudsburg Area School District[14] the Pennsylvania Commonwealth Court on December 21, 1971, upheld a regulation which required a resignation at the end of the fifth month of pregnancy. The Court held that the regulation was reasonable, based on experience indicating that a good management of the school system required such resignations in order to avoid a critical shortage of teachers since pregnant teachers granted maternity leave often failed to return. The Court, in its decision, relied on a decision by the Pennsylvania Supreme Court in the Brown case[15] decided in 1943 and upon Ambridge Borough School District's Board of School Directors v Snyder[16] decided in 1942. It brushed aside the Cohen decision[17] in view of the decisions of the Pennsylvania Supreme Court.

There were two dissenting opinions in this case, one of which expressed the view that the regulation violated the Fourteenth Amend-

ment by denying equal protection of the laws.

In Guelich v Mounds View Independent Public School District No. 621[18] the United States District Court, District of Minnesota, Third Division held that a claim for damages under the Civil Rights Act[19] could not be entertained since a board of education is not a person within the meaning of that law.

On February 18, 1972, the Michigan Attorney General rendered an Opinion holding that the rules governing eligibility for unemployment insurance benefits that deprive a pregnant woman of eligibility to receive benefits during the period that begins with the tenth calendar week before expected confinement and extending through the sixth calendar week following termination of pregnancy are invalid because they discriminate against females on the basis of a physical condition unique to that sex and are in violation of the equal protection clause of the Federal Constitution. Subjecting pregnant and post-pregnant women to more stringent eligibility requirements than are applied to similarly temporarily disabled men is patently discriminatory.

Schattman v Texas Employment Commission[20] decided on March 1, 1972 (amended March 17) reversed a lower United States District Court decision[21] and upheld a policy of terminating pregnant female employees two months prior to the expected delivery date. It had been alleged that the policy violated the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment. The District Court so ruled.

The Circuit Court of Appeals held that a state or political subdivision was not subject to the provisions of the Civil Rights Act of 1964. It further held that there was no violation of any Constitutional rights and that the regulation was not unreasonable or arbitrary. It is interesting to note at this point that the amendments to the Civil Rights Act of 1972, mentioned at the start of this talk, were signed into law on March 24, 1972.

In Williams v San Francisco Unified School District[22], the United States District Court for the Northern District of California held, on March 21, 1972, that a policy which required pregnant employees to take a leave at least two months before the anticipated delivery date was violative of the equal protection clause of the Fourteenth Amendment to the Federal Constitution because it singled out pregnant certificated employees for classification without any rational relationship to any legitimate objective of the school district and, in addition, promoted no compelling interest of the district or the state. The employee was entitled to a preliminary injunction where, apart from the court's belief of the probability of her ultimate success on the merits of the case, she had sustained her burden of showing that on the basis of the record, the balance of hardships tipped decidedly in her favor.

In Connecticut, the Commission on Human Rights and Opportunities in the case of Staten v East Hartford Board of Education[23] held on March 28, 1972 that a city board of education discriminated against a female school teacher on the basis of sex by requiring

her to take maternity leave without pay from the fifth month of pregnancy up to and including the third month following the termination of pregnancy. By virtue of its policy, the board of education only requires such leaves of women. Women are terminated not because of their willingness to continue work, their job performance, or their need for personal medical safety, but solely because of a condition attendant to their sex. The special treatment with regard to maternity was based on sex within the meaning of the state law banning such discrimination.

In Monell v Department of Social Services of the City of New York[24] Judge Constance Baker Motley ruled on April 12, 1972 that a federal trial court had subject matter jurisdiction of an action challenging the validity of a policy requiring pregnant women employees to take unpaid leaves of absence after the seventh month of pregnancy. The action had been instituted by female employees of the New York City Board of Education and the New York City Department of Social Services.

Said Judge Motley:

> "Discrimination against women in employment generally is now prohibited by national law. 42 U.S.C. ¶2000e. Discrimination against pregnant women employees and in the application of disability benefits to pregnancies has recently been prohibited by the Rules and Regulations of the Equal Employment Opportunity Commission. 37 Fed. Reg. 6837. An equal rights amendment to the Federal Constitution is making its way through the ratification process of the states. Sex legislation is thus automatically suspect. Reed v Reed, supra."

She held that the complaint could not be dismissed for failure to state a claim upon which relief may be granted.

On the same day that Judge Motley decided the Monell case, she decided the first case on record that I have been able to find dealing with an application by a male for leave under a maternity leave policy. Lest anyone conjure up any vision of a pregnant male about ready to disgorge a child, rest easily. Such was not the case.

In Danielson v Board of Higher Education, et al[25], Judge Motley passed upon a challenge by one Ross Danielson, a lecturer in sociology of the City University of New York, of a pregnancy leave policy in effect at the City University. Mr. Danielson claimed that women faculty members were permitted to take leaves of absence up to three semesters, for the purpose, among others, of caring for a new-born infant, without adversely affecting their tenure rights, but the same child care privilege was denied to men. He sought a declaration that the maternity leave provision was unconstitutional on its face and as applied to male faculty members. He sought an injunction enjoining the defendants from discharging him or otherwise penalizing him for having taken child-care leave.

Mr. Danielson's wife was a teacher at Lehman College. When she learned of her pregnancy it was decided that she would continue her teaching duties throughout her pregnancy and after childbirth. For the first six months after the child was born, Mr. Danielson would stay home and rear the infant.

He attempted to obtain a "parental leave of absence" which

leave, it was contended, was available for women faculty members. His request for leave was rejected.

Judge Motley ruled that the complaint could not be dismissed for failure to state a claim upon which relief may be granted.

On Sunday, September 24, 1972, the New York Times reported in a Page 1 story that prospective fathers would receive paternity leaves under a pioneer contract proposed by the City University of New York to its professional staff. The proposals included up to 20 days of paid leave and up to 18 months of unpaid leave for both men and women. Apparently, the decision of Judge Motley in the Danielson case bore fruit.

In Allison v Board of Education Union Free School District No. 22[26] it was held that an action brought by a public school teacher seeking compensatory damages on the ground that she was unlawfully discriminated against on account of her six in being placed on an unpaid maternity leave must be dismissed because she had earlier elected to take her charges to the State Human Rights Agency which had the authority to award damages. Since the question of damages as well as the alleged act of discrimination should have been before the court in the same proceedings, there was no basis for splitting off the request for declaratory relief.

In Antonopoulou v Beame[27], a grievance award of back pay to a female college lecturer for earnings lost from the date she requested, but was refused, termination of maternity leave to the date she was offered reinstatement could not be enforced since the award amounted

to a gift of public funds for services not rendered.

In Heath v Westerville Board of Education[28], it was held that a board of education violated an 1871 law by discharging a non-tenured teacher with less than three years of service under an existing maternity leave policy because she had entered her sixth month of pregnancy. The policy was held to deny pregnatn women equal protection of the laws under the Fourteenth Amendment because it treated pregnancy different from other medical disabilities. The Court also held that an attempt to distinguish in terms of maternity leave policy between the untenured pregnant teacher of more than three years' service and those of less than three years' service was arbitrary and unlawful.

In Pocklington v Duval County School Board, et al[29], it was held that in the absence of any medical justification for a maternity leave policy requiring a leave of absence by pregnant female teachers after for and one-half months of pregnancy, a preliminary injunction requiring the authorities to permit a teacher on leave to resume her teaching duties would be made final and the school assessed for back wages representing the amount of earnings lost due to the policy. It was further held that the pregnant teacher was denied equal protection of the laws and denied due process of law by the application of the policy without an opportunity to establish her medical fitness to continue teaching.

In Bravo v Board of Education of City of Chicago, et al,[30] it was also held that a policy requiring pregnant female teachers to

take fixed periods of maternity leaves denied the equal protection of the laws and the policy made an invalid distinction in regard to sick pay, seniority and other employment benefits as between teachers on maternity leave and those on leave for illness. The Court Ordered the board to treat maternity leaves as leaves due to illness under the board's rules.

It is quite obvious from a consideration of the foregoing cases that the subject of sex discrimination is one that will continue to bear watching for a long period of time!

FOOTNOTES

*NOTE: References hereafter to E.P.D. are to Employment Practices Decisions published by Commerce Clearing House (C.C.H.)

1. P.L. 88-352; 42 U.S.C. Sec. 2000 et seq.

2. P.L. 92-261; 86 Stat. 103

3. Sec. 701 (a)

4. Sec. 701 (b)

5. Sec. 702

6. 326 F. Supp. 1208; 3 E.P.D ¶8228 (C.C.H.)

7. ---F 2d.---4 E.P.D. ¶7921 (C.C.H.)

8. 326 F. Supp. 1159; 3 E.P.D. ¶8231 (C.C.H.)
Aff'd --- f. 2nd --- 5 E.P.D. ¶7967 (C.C.H.)

9. 332 F. Supp. 254; 4 EPD ¶7684 (C.C.H.)
Aff'd in Part and remanded in Part ---Frd. ---; 4 E.P.D. ¶7922 (C.C.H.)

10. N. J. Division of Civil Rights, Docket No. E02ES-5337

11. N. J. Division of Civil Rights, Docket No. E14ES-5422

12. Decision No. 8353, N.Y. Commissioner of Education, Sept. 24, 1971

13. 4 E.P.D. ¶7735 (C.C.H.)

14. 285 A.2d.206; 4 E.P.D. ¶7607 (C.C.H.)

15. 32 A.2d.565; (1943)

16. 29 A.2d.34; (1942)

17. See Footnote 8, Ante.

18. 4 E.P.D. ¶7625 (C.C.H.)

19. 42 U.S.C. Sec. 1983

20. 40 U.S. Law Week 2614; 459 F.2d.32 4 E.P.D. ¶7679 (C.C.H.)
Rehearing Denied 4 E.P.D. ¶7864

21. 330 F. Supp. 328

22. 4 E.P.D. ¶7771 (C.C.H.)

23. Case No. FEP-6-34-1; EPGuide ¶5055 (C.C.H.)

24. 4 E.P.D. ¶7765 (C.C.H.)

25. 4 E.P.D. ¶7773 (C.C.H.)

26. 4 E.P.D. ¶7840 (N.Y. Sup. Ct. Nassau Co., 5/18/72)

27. 4 E.P.D. ¶7887 (N.Y. Sup. Ct., App. Div., 5/18/72)

28. 5 E.P.D. ¶7951 (U.S.D.C.S.D. Ohio, Eastern Division, 6/28/72)

29. 5 E.P.D. ¶7937 (U.S.D.C.M.D. Fla., Jacksonville Div., 6/13/72)

30. 5 E.P.D. ¶7941 (U.S.D.C.N.D. Ill., Eastern Div., 7/7/72)